







# In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 22

UNITED STATES OF AMERICA, PETITIONER

*Illinois*

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## MOTION FOR SUBSTITUTION

In response to the suggestion of counsel for respondents (Br. in Opp., p. 1) of the death on October 16, 1937, of Henry Duggan, one of the defendants named in the Bill of Complaint in this cause, comes now the Solicitor General on behalf of the petitioner and moves that an order be entered by the Court substituting the Continental National Bank and Trust Company of Chicago, *Illinois*, Executor under the last will and testament of Henry Duggan, deceased, as a party defendant, and that

(1)

the proceeding he continued as to the said Henry Duggan in the name of the Continental National Bank and Trust Company as the duly qualified and appointed Executor under his last will and testament.

ROBERT H. JACKSON,  
*Solicitor General.*

**In the Supreme Court of the United States**

**OCTOBER TERM, 1938.**

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**No. 22**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
A CORPORATION, TRUSTEE UNDER THE LAST WILL  
AND TESTAMENT OF JAMES DUGGAN, DECEASED,  
ET AL.**

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**ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

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**AFFIDAVIT IN SUPPORT OF MOTION FOR SUBSTITUTION**

**Fred E. Youngman, being first duly sworn, represents:**

**1. That he is now, and at all times hereinafter mentioned, was employed as an attorney in the Tax Division of the United States Department of Justice, and in the course of such employment he has acted as one of the attorneys for the United States in the above-entitled proceeding.**

**2. On November 1, 1937, the above cause came on for hearing in regular course before the United**

**(3)**

States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois. Your deponent appeared before the Circuit Court of Appeals on that date and presented oral argument on behalf of the United States. Herbert Pope, Esquire, 112 South LaSalle Street, Chicago, Illinois, appeared and presented oral argument on behalf of the defendants named in the Bill of Complaint.

3. Henry Duggan, one of the defendants named in the Bill of Complaint in the above-entitled action, died testate on October 16, 1937, while the appeal herein was pending before the Circuit Court of Appeals for the Seventh Circuit. The last will and testament of Henry Duggan, deceased, was proved on November 23, 1937, and in accordance with the terms of his will letters testamentary were granted to the Continental National Bank and Trust Company of Chicago, Illinois, as Executor of the Last Will and Testament of Henry Duggan, deceased.

4. At the time of the hearing before the Circuit Court of Appeals for the Seventh Circuit, on November 1, 1937, the death of Henry Duggan, one of the defendants named in the Bill of Complaint, was not suggested to the Court by counsel for the defendants and counsel for the United States were not advised of the death of Henry Duggan until several months later.

5. On January 5, 1938, the Circuit Court of Appeals for the Seventh Circuit filed its opinion in the above-entitled cause affirming the judgment of the



District Court of the United States for the Northern District of Illinois, and on January 26, 1938, the mandate of that Court was issued and forwarded to the Clerk of the United States District Court for the Northern District of Illinois.

6. The Solicitor General of the United States, on March 25, 1938, authorized the filing of a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit in the above cause, and on March 26, 1938, the United States Attorney for the Northern District of Illinois was instructed by the Department of Justice to suggest to the Circuit Court of Appeals for the Seventh Circuit the death of Henry Duggan and to present a motion, pursuant to Rule 17 of that Court's Rules of Practice, for an order substituting the executor of Henry Duggan, deceased, as a party defendant in such proceeding. The United States Attorney for the Northern District of Illinois on April 1, 1938, filed a motion, a copy of which is attached hereto and marked "Exhibit A", wherein he moved the Court (1) to recall its mandate issued under date of January 26, 1938, (2) to substitute as a party defendant the executor of the last will and testament of Henry Duggan, deceased, and (3) that an appropriate order be entered by the Court to prevent any distribution of assets to the detriment of the United States pending disposition by this Court of the petition for a writ of certiorari.

7. On April 5, 1938, the Circuit Court of Appeals for the Seventh Circuit denied the motion made on



behalf of the United States to recall the mandate of the Circuit Court of Appeals and to substitute the executor of Henry Duggan, deceased, as a party defendant, and for an order to prevent any distribution of assets pending disposition by this Court of the petition for a writ of certiorari. A copy of the notice to this effect, received from the Clerk of the Circuit Court of Appeals, is attached hereto and marked "Exhibit B."

8. On April 5, 1938, the Solicitor General, on behalf of the United States, filed a petition with this Court for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause. Counsel for the defendants refused to accept service of the petition for a writ of certiorari on the ground that one of the defendants named in the Bill of Complaint had died since the commencement of the action and that there had been no proper substitution of his personal representative. On May 16, 1938, this Court granted the petition for a writ of certiorari.

FRED E. YOUNGMAN.

DISTRICT OF COLUMBIA,

*City of Washington, ss.*

Subscribed and sworn to before me this 26th day of September, A. D., 1938.

[SEAL]

NELLIE E. BISHOP,

*Notary Public, District of Columbia.*

My Commission expires Jan. 15, 1939.

**EXHIBIT A**

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**In the United States Circuit Court of  
Appeals for the Seventh Circuit**

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**C. C. A. No. 6332**

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**THE UNITED STATES OF AMERICA, APPELLANT**

**v.**

**CONTINENTAL NATIONAL BANK AND TRUST COM-  
PANY, A CORPORATION, TRUSTEE UNDER THE LAST  
WILL AND TESTAMENT OF JAMES DUGGAN,  
DECEASED, AND HENRY DUGGAN, ET AL., APPELLEES**

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**MOTION**

Comes now the United States of America, ap-  
pellant in the above-entitled cause, by its attorneys,  
Michael L. Igoe, United States Attorney for the  
Northern District of Illinois, and Raymond P.  
Drymalski, Assistant United States Attorney, and  
respectfully represents to this Court as follows:

1. That an order was entered by this Court on  
January 5, 1938, affirming the judgment of the  
District Court of the United States for the North-  
ern District of Illinois, Eastern Division; that pur-  
suant to said order the mandate of this Court was

issued and forwarded to the Clerk of the District Court of the United States on January 26, 1938.

2. That your appellant is entitled to ninety days from the date of the entry of the order of this Court within which to file its petition for certiorari in the Supreme Court of the United States; that said time does not expire until the 5th day of April, 1938.

3. That the Solicitor General of the United States, the officer of the Government charged with the duty of considering and determining whether petitions for certiorari are to be filed in the Supreme Court of the United States, has now fully considered the matter of filing a petition for certiorari in the Supreme Court of the United States in the above-entitled cause, and has just now determined that said petition will be entered; that said petition is now being prepared and will be filed forthwith.

4. That your appellant in the above-entitled cause suggests to this Court that Henry Duggan, one of the appellees in said cause, died testate on October 16, 1937, pending the appeal herein; that the Will and Testament of said Henry Duggan, deceased, was proven on November 23, 1937, and that in accordance with the terms of said Will letters testamentary were granted to the Continental National Bank and Trust Company as executor of the Will and Testament of said Henry Duggan, deceased.

5. That in the will of James Duggan, deceased, in Paragraph 8 thereof, provision is made for the termination of the Trust involved in this cause, on the death of said Henry Duggan, and for the distribution of the trust corpus in accordance with the

Will and Testament of the said Henry Duggan, deceased.

WHEREFORE, your appellant moves this Honorable Court as follows:

A. That the mandate of this Court heretofore issued and forwarded to the Clerk of the United States District Court for the Northern District of Illinois, on January 26, 1938, be recalled and stayed pending the disposition and determination of the petition for certiorari, or until the further order of this Court.

B. That this Court enter its order substituting as party appellee in this cause, for Henry Duggan now deceased, the Continental National Bank and Trust Company, executor of the Last Will and Testament of Henry Duggan, deceased.

C. That this Court enter an appropriate order to prevent any distribution of assets to the detriment of your appellant pending disposition by the Supreme Court of the United States of your appellant's petition for certiorari.

MICHAEL L. IGOE,

*United States Attorney.*

RAYMOND P. DRYMAJSKI,

*Assistant United States Attorney.*

*Attorneys for Appellant.*

STATE OF ILLINOIS,

*County of Cook, ss:*

JOHN DZIEDZIC, being first duly sworn, on oath deposes and says that he is employed as Clerk in the office of the United States Attorney, Chicago, Illinois; that on March 31, 1938, at the hour of 2:10 p. m. he called at the office of Butler, Pope, Ballard, and Elting, 120 S. La Salle Street, Chicago, Illinois, for the purpose of serving a copy of the above

Motion; that he did serve a copy of said Motion on Herbert Pope, one of the attorneys of said firm, and that said Herbert Pope retained a copy of said Motion in his office, but refused to receipt for same.

JOHN DZIEDZIC.

Subscribed and sworn to before me this 31st day of March, A. D. 1938.

ANNA L. MINAHAN.

*Notary Public.*

RECEIVED copy of the above Motion this ---- day of March, A. D. 1938.

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*Attorneys for Appellees.*

## EXHIBIT B

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OFFICE OF THE CLERK, UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT,  
*Chicago, April 5, 1938.*

DEAR SIR: An order was entered in this court today in Cause No. 6332, *The United States of America vs. Continental National Bank and Trust Co., Trustee, et al.*, denying motion of counsel for appellant to recall the mandate of this Court in this cause heretofore issued on January 26, 1938. Denying motion of counsel for appellant to substitute Continental National Bank and Trust Co., Executor of the Last Will and Testament of Henry Duggan, deceased, as party appellee, for Henry Duggan, deceased. And denying motion of counsel for appellant for an order to prevent any distribution of assets pending disposition by the Supreme Court of appellant's petition for writ of certiorari.

Respectfully,

FREDERICK G. CAMPBELL,

*Clerk.*

To:

M. L. Igoe, U. S. Attorney, Chicago.

James W. Morris, Ass't Attorney General,  
Washington.

Herbert Pope & Benjamin M. Price, 120 S.  
La Salle St., Chicago.

(11)